BRB No. 08-0480 BLA

V.B.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED: 03/30/2009
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand – Award of Benefits of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Ronald K. Bruce, Greenville, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

DOLDER, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order on Remand – Award of Benefits (2004-BLA-5249) of Administrative Law Judge Larry S. Merck rendered on a claim filed on November 1, 2001, pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). This case

is before the Board for the second time. In the original Decision and Order, Administrative Law Judge Daniel J. Roketenetz found that the instant claim was timely filed pursuant to Section 422(f) of the Act, 30 U.S.C. §932(f), and its implementing regulation at 20 C.F.R. §725.308(a). That section provides a rebuttable presumption that a claim is timely filed if it is filed within three years after a medical determination of total disability due to pneumoconiosis has been communicated to the miner. Claimant testified that two physicians had communicated to him their diagnoses of total disability due to pneumoconiosis more than three years before he filed his claim in 2001. However, Judge Roketenetz found that as neither of these physicians' opinions was contained in the record, he could not determine whether they were documented and reasoned opinions of total disability due to pneumoconiosis. Judge Roketenetz concluded that employer failed to rebut the presumption of timeliness pursuant to Section 725.308(c), and determined that the claim would not be dismissed for failure to meet the three-year time limitation. Judge Roketenetz then credited claimant with twenty years of coal mine employment based on the parties' stipulation, and considered the merits of the claim under 20 C.F.R. Part 718. Weighing the medical evidence of record, Judge Roketenetz found that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). In addition, he found that the medical evidence established total respiratory disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, Judge Roketenetz awarded benefits, commencing November 2001.

Pursuant to employer's appeal, the Board vacated the award of benefits and remanded the case for further consideration of the medical evidence pursuant to Sections 718.202(a)(4) and 718.204(c). [*V.B.*] *v. Peabody Coal Co.*, 23 BLR 1-170 (2006)(*en banc*). Initially, the Board rejected employer's contentions regarding the timeliness of the claim and affirmed Judge Roketenetz's determination that the claim was timely filed. The Board held that under the language set forth in *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 607, 22 BLR 2-288, 2-296 (6th Cir. 2001), claimant's mere statement that he was told by doctors that he was totally disabled due to pneumoconiosis was insufficient to trigger the running of the statute of limitations, as the statute relies on the trigger of the reasoned opinion of a medical professional, and the evidence in this case cannot meet that standard.[1] [*V.B.*], 23 BLR at 1-175. Next, the Board affirmed Judge Roketenetz's finding that the medical evidence was sufficient to establish total disability

[1] The United States Court of Appeals for the Sixth Circuit stated that it is "employer's burden to rebut the presumption of timeliness by showing that a medical determination satisfying the statutory definition was communicated to [the claimant]" more than three years prior to the filing of his/her claim. *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 607, 22 BLR 2-288, 2-296 (6th Cir. 2001).

pursuant to Section 718.204(b)(2). *Id*. at 1-179-180. However, the Board vacated Judge Roketenetz's finding that the medical opinion evidence was sufficient to establish clinical and legal pneumoconiosis pursuant to Section 718.202(a)(4), and remanded the case for further consideration of the relevant medical opinion evidence thereunder. *Id*. at 1-177-178. In addition, the Board vacated the administrative law judge's finding that claimant's total disability was due to pneumoconiosis at Section 718.204(c). The Board held that, if reached on remand, the administrative law judge must consider all of the medical evidence relevant to the issue and must fully explain the rationale for his findings at Section 718.204(c). *Id*. at 1-180.

On remand, Administrative Law Judge Larry S. Merck (the administrative law judge)[2] noted the Board's remand instructions and found that the medical opinion evidence was sufficient to establish the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4).[3] In addition, he found that the evidence was sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to Section 718.204(c). Accordingly, the administrative law judge awarded benefits, commencing as of November 2001.

On appeal, challenging the Board's holding affirming Judge Roketenetz's determination that the claim was timely filed pursuant to Section 725.308, employer argues that the Board's holding is at odds with the plain language of the statute and with the case law of the United States Court of Appeals for the Sixth Circuit, citing *Kirk*, 264 F.3d 602, 22 BLR 2-288. Further, employer challenges the administrative law judge's findings that claimant established the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4) and that his pneumoconiosis was totally disabling pursuant to Section 718.204(c). In response, claimant urges affirmance of the administrative law judge's award of benefits. Employer has submitted a reply brief, reiterating its position. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not file a substantive response brief, unless requested to do so by the Board.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence,

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[2] Prior to the decision on remand, Administrative Law Judge Daniel J. Roketenetz retired from the Office of Administrative Law Judges. The case was therefore transferred to Administrative Law Judge Larry S. Merck (the administrative law judge).

[3] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2); *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Henley v. Cowan & Co.*, 21 BLR 1-147, 1-151 (1999).

and in accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, we address employer's contention that the Board's holding that the claim was timely filed pursuant to Section 725.308 is erroneous and should be reconsidered. In particular, employer states that it is "briefing its objection to this aspect of the Board's decision for the Board to either reconsider or to preserve the issue for further proceedings." Employer's Brief at 8. In challenging this issue again, employer argues that the Board erred in holding that claimant's uncontradicted testimony regarding the contents of a medical opinion is not sufficient to trigger the start of the three-year statute of limitations for filing a black lung claim. Employer argues that the regulation states that the time limitations begin to run when "'a medical determination of total disability due to pneumoconiosis' is 'communicated to the miner'" and does not require that the record contain the medical report. 20 C.F.R. §725.308(a), (c); Employer's Brief at 9. Employer contends that its position is supported by the holding of the United States Court of Appeals for the Fourth Circuit, in *Island Creek Coal Co. v. Henline*, 456 F.3d 421, 23 BLR 2-321 (4th Cir. 2006); where the court held that a medical determination of total disability due to pneumoconiosis need not be communicated to claimant in writing. Employer's Brief at 13. Therefore, employer asserts that claimant's testimony that he was told by two doctors that he was totally disabled eight years before filing his appeal is sufficient to bar this claim as untimely. Accordingly, employer requests that the Board reconsider its prior holding.

We decline to reconsider the Board's prior holding in this case, *i.e.*, that the November 2001 claim was timely filed. In its original decision, the Board held that claimant's mere statement that he was told that he was totally disabled due to black lung is insufficient to trigger the running of the statute of limitations, specifically stating that: "based on the facts of this case, we need not address the assertions of the Director and employer that a medical determination of total disability due to pneumoconiosis need not be in writing for the purpose of triggering the three-year limitations period[,]" as it could not be determined on the facts of this case whether a "reasoned" medical determination had been made. [*V.B.*], 23 BLR at 1-175 n.4. Employer raises no new grounds for the Board to reconsider its prior holding, but merely reiterates the arguments that the Board previously rejected. The Board's previous disposition of this issue constitutes the law of the case. Because employer does not argue that an exception to the law of the case doctrine applies in this case, and we are not persuaded that the law of the case doctrine is

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 3.

inapplicable, or that an exception has been demonstrated, we need not revisit this issue. *See Braenovich v. Cannelton Industries, Inc.*, 22 BLR 1-236, 1-246 (2003); *Troup v. Reading Anthracite Coal Co.*, 22 BLR 1-11 (1999)(*en banc*); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984). Moreover, employer again notes its disagreement with Judge Roketenetz's finding that claimant established total respiratory disability pursuant to Section 718.204(b)(2). Employer's Brief at 22-23 n.5. However, because the Board has previously affirmed this finding as supported by substantial evidence, such disposition constitutes law of the case. [*V.B.*], 23 BLR at 1-179-180. Since employer does not argue that any exceptions to the law of the case doctrine apply herein, or that an exception has been demonstrated, we need not revisit this issue. *See Braenovich*, 22 BLR at 1-246; *Troup*, 22 BLR at 1-22; *Brinkley*, 14 BLR at 1-150-151.

Employer next contends that the administrative law judge erred in finding the medical opinion evidence sufficient to establish the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4). For the reasons discussed, *infra*, we vacate the administrative law judge's finding that claimant established the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4) and remand this case for the administrative law judge to reconsider the relevant evidence.

Pursuant to Section 718.202(a)(4), the administrative law judge considered the medical opinions of Drs. Simpao and Baker, both of whom diagnosed the existence of clinical and legal pneumoconiosis. In addition, the administrative law judge considered the contrary opinions of Drs. Repsher and Fino, that there was no evidence of coal workers' pneumoconiosis, but that claimant's respiratory impairment was due to his cigarette smoking. On the issue of legal pneumoconiosis,[5] the administrative law judge noted the Board's remand instructions and, thus, reconsidered the medical opinions of Drs. Simpao, Baker, Repsher and Fino. Weighing these medical opinions, the administrative law judge accorded determinative weight to the opinion of Dr. Simpao. The administrative law judge found that Dr. Simpao's opinion was well-reasoned and well-documented because Dr. Simpao based his finding of an occupational lung disease on the results of a pulmonary function study, physical findings and symptomatology from his examination of claimant, in addition to an x-ray interpretation. Decision and Order on Remand at 7. The administrative law judge found that the remaining medical opinions of

[5] The administrative law judge initially determined that the medical opinions were insufficient to establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), because the opinions, which diagnosed either the presence or the absence of clinical pneumoconiosis, were merely restatements of x-ray readings and, were not, therefore, entitled to any weight at Section 718.202(a)(4). *See Taylor v. Brown Badgett, Inc.*, 8 BLR 1-405 (1985); Decision and Order on Remand 7, 9, 12, 14, 15.

Drs. Baker, Repsher and Fino were not well-reasoned or well-documented and, therefore, accorded these opinions little weight. Decision and Order on Remand at 9-14. Consequently, the administrative law judge found that the medical evidence was sufficient to establish the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4). Decision and Order on Remand at 15.

In challenging the administrative law judge's findings on the merits of entitlement, employer contends that the administrative law judge erred in finding the opinion of Dr. Simpao sufficient to establish the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4). Specifically, employer contends that the administrative law judge erred in failing to adequately explain how Dr. Simpao's opinion was sufficient to establish legal pneumoconiosis, in light of his apparent reliance on a positive x-ray interpretation. Employer's Brief at 15-16. In addition, employer argues that the administrative law judge mischaracterized Dr. Simpao's opinion and substituted his own description of claimant's impairment for that of the physician. *Id*. at 17. Employer further contends that the administrative law judge rejected the opinions of Drs. Repsher and Fino for impermissible reasons. Specifically, employer contends that the administrative law judge impermissibly rejected Dr. Repsher's opinion because the physician did not explain why he eliminated coal dust exposure as a cause of claimant's disability, and also, that the administrative law judge impermissibly used the 20 C.F.R. §718.203(b) presumption to discredit Dr. Repsher's opinion that claimant's chronic bronchitis and pulmonary emphysema were not due to coal dust exposure. *Id*. at 18-19. With regard to Dr. Fino's opinion, employer contends that the administrative law judge erred in relying on the holding of the United States Court of Appeals for the Seventh Circuit in *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 22 BLR 2-265 (7th Cir. 2001) to reject Dr. Fino's opinion. *Id*. at 20-22.

There is merit to employer's contentions regarding the administrative law judge's weighing of the medical opinion evidence pursuant to Section 718.202(a)(4). In finding that Dr. Simpao's opinion was entitled to determinative weight, the administrative law judge did not adequately set forth his rationale for finding that Dr. Simpao's opinion was well-reasoned and well-documented. The administrative law judge noted that Dr. Simpao stated that his diagnosis of an occupational lung disease due to claimant's coal mine employment was based on his "findings on the chest x-ray, and pulmonary function test along with physical findings and symptomatology." Decision and Order on Remand at 7; Director's Exhibit 11. However, the administrative law judge did not sufficiently explain his rationale for finding that this underlying documentation supported Dr. Simpao's conclusions, particularly his statement that he "factored in Dr. Simpao's reliance upon the x-ray reading." Decision and Order on Remand at 7. In weighing Dr. Simpao's opinion, the administrative law judge did not explain how he determined that a physician's reliance on a positive x-ray interpretation supported the doctor's opinion of legal pneumoconiosis. *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir.

1983); *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589, 1-591 (1984); Decision and Order on Remand at 7. Moreover, the administrative law judge did not explain how he found Dr. Simpao's finding of a "permanent impairment," met the requirement in the regulation that claimant have a "chronic lung disease or impairment and its sequelae arising out of coal mine employment" to establish legal pneumoconiosis. 20 C.F.R. §718.201(a)(2); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); Decision and Order on Remand at 7; Director's Exhibit 11. Consequently, we vacate the administrative law judge's crediting of Dr. Simpao's opinion of legal pneumoconiosis at Section 718.202(a)(4) and remand the case for the administrative law judge to provide a more detailed explanation of his rationale for crediting this opinion. 20 C.F.R. §§718.201(a)(2), 718.202(a)(4); *see Wojtowicz*, 12 BLR at 1-165; *Tenney*, 7 BLR at 1-591.

Moreover, we vacate the administrative law judge's finding that Dr. Repsher's opinion is not well-reasoned or well-documented and, thus, entitled to little weight. In according little weight to Dr. Repsher's opinion, the administrative law judge found that Dr. Repsher's reliance on claimant's smoking history was not a reasoned explanation for his conclusions. Decision and Order on Remand at 12. In addition, citing *Crockett Collieries, Inc., v. Director, OWCP* [*Barrett*], 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007), the administrative law judge found that Dr. Repsher's opinion, that claimant did not have legal pneumoconiosis, was not well-reasoned because it conflicted with the regulation at Section 718.203(b), which provides a presumption that pneumoconiosis arises out of coal mine employment if claimant has ten or more years of coal mine employment. Decision and Order on Remand at 12-13. However, contrary to the administrative law judge's finding, the holding in *Barrett* does not provide a claimant who establishes legal pneumoconiosis, with a presumption that his "legal" pneumoconiosis arose out of coal mine employment based on his length of coal mine employment. Rather, in establishing "legal" pneumoconiosis, claimant bears the burden of establishing that his pulmonary or respiratory impairment arose out of coal mine employment. 20 C.F.R. §§718.201(a)(2), 718.202(a)(4); *Williams*, 338 F.3d at 511, 22 BLR at 2-642; *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Henley v. Cowan & Co.*, 21 BLR 1-147, 1-151 (1999); *see Anderson v. Director, OWCP*, 455 F.3d 1102, 23 BLR 2-332 (10th Cir. 2006). Consequently, on remand, the administrative law judge must reconsider Dr. Repsher's opinion without reference to the presumption set forth at Section 718.203(b), to determine whether Dr. Repsher has provided a credible rationale for his opinion that claimant's coal mine employment played no role in his respiratory condition.

In addition, we vacate the administrative law judge's finding that Dr. Fino's medical opinion, that claimant's respiratory impairment was due to smoking, is not well-reasoned and, therefore, entitled to little weight, because the administrative law judge has

not adequately explained the basis for this determination. While the administrative law judge may properly give less weight to an opinion that fails to provide adequate documentation or reasoning for its conclusion, the administrative law judge in this case, has not discussed the specifics of Dr. Fino's opinion nor the rationale that Dr. Fino provided for concluding that claimant's respiratory impairment was due entirely to his smoking history. *See* Decision and Order on Remand at 14; Employer's Exhibit 2. Consequently, on remand, the administrative law judge must reconsider Dr. Fino's opinion. *See Williams*, 338 F.3d at 511, 22 BLR at 2-642; *Cornett*, 227 F.3d at 576, 22 BLR at 2-121; *see also Wojtowicz*, 12 BLR at 1-165; *Tenney*, 7 BLR at 1-591.

Employer also generally contends that the administrative law judge erred in failing to explain why he found total disability due to pneumoconiosis established at Section 718.204(c) based on Dr. Simpao's opinion. The administrative law judge, relying on his Section 718.202(a)(4) credibility determinations, stated that "I determined that Dr. Fino's, Dr. Repsher's and Dr. Baker's medical reports are unreasoned on the issue of legal pneumoconiosis and accordingly give them little weight on the issue of total disability due to pneumoconiosis." Decision and Order on Remand at 17. The administrative law judge concluded that "I find that Claimant has established total disability due to pneumoconiosis based on the well-reasoned and documented report of Dr. Simpao, whose opinion is based on the objective medical testing and his personal evaluation of Claimant and his medical and occupational histories." *Id.*

In light of our holding vacating the administrative law judge's weighing of the medical opinions of Drs. Simpao, Repsher and Fino pursuant to Section 718.202(a)(4), *see* discussion, *supra*, we also vacate the administrative law judge's Section 718.204(c) finding because it is based on his credibility determinations under Section 718.202(a)(4). Decision and Order on Remand at 17. If, on remand, the issue of disability causation pursuant to Section 718.204(c) is again reached, the administrative law judge must consider all the relevant evidence as to whether claimant's total respiratory disability is due to pneumoconiosis, 20 C.F.R. §718.204(c); *Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989), and fully explain the rationale for his conclusions, *Wojtowicz*, 12 BLR at 1-165; *Tenney*, 7 BLR at 1-591.

Accordingly, the administrative law judge's Decision and Order on Remand – Award of Benefits is vacated and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur:

_____
ROY P. SMITH
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, concurring and dissenting:

I concur in the majority's determinations that the Board's prior decision in this case, holding that claimant's November 2001 application for benefits was timely filed and that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2), constitutes the law of the case, and, therefore, will not be disturbed. I respectfully dissent, however, from my colleagues' decision to vacate the administrative law judge's weighing of the medical opinion evidence, finding that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and causation of total disability pursuant to 20 C.F.R. §718.204(c) and, thus, his award of benefits. I believe that employer has failed to demonstrate that the administrative law judge abused his discretion in making his credibility determinations regarding the medical opinions of Drs. Simpao, Repsher and Fino. The case at bar arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit which has repeatedly declared that the question "'of whether a physician's report is sufficiently documented and reasoned is a credibility matter left to the trier of fact.'" *Crockett Collieries, Inc., v. Director, OWCP* [*Barrett*], 478 F.3d 350, 355, 23 BLR 2-472, 2-482 (6th Cir. 2007), *quoting Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989) (*quoting Moseley v. Peabody Coal Co.*, 769 F.2d 357, 360, 8 BLR 2-22, 2-25 (6th Cir. 1985)). Adhering to the appropriate, "exceedingly narrow," standard of review, I would affirm the administrative law judge's determinations on remand that claimant has established legal pneumoconiosis and

causation; accordingly, I would affirm the award of benefits. *Knuckles v. Director, OWCP*, 869 F.2d 996, 997, 12 BLR 2-217, 2-218 (6th Cir. 1989).

Employer argues that the administrative law judge erred in his analysis of the medical opinion evidence regarding the existence of pneumoconiosis and total disability causation. Specifically, employer contends that the administrative law judge erred in finding both that Dr. Simpao's opinion was well-reasoned and well-documented, and in finding that the opinions of Drs. Repsher and Fino were not well-reasoned. Decision and Order on Remand at 15. Essentially, employer requests the Board to overrule the administrative law judge's credibility determinations. The Sixth Circuit court is emphatic that this request must be rejected:

> [E]mployer's central argument, when stripped to its essentials, appears to be a quarrel with the [administrative law judge's] credibility determinations. But this court is required to defer to the [administrative law judge's] assessment of the physicians' credibility. *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836 (6th Cir. 2002) ("Lacking the authority to make credibility determinations, we will defer to the [administrative law judge's findings]").

Napier, 301 F.3d at 713-714, 22 BLR at 2-553. Despite the Sixth Circuit's admonition, my colleagues have chosen to entertain employer's attacks on the administrative law judge's credibility determinations. I will discuss them *seriatim*, showing that none can withstand scrutiny when considered in light of the record and the law.

The majority accepts employer's contention that the administrative law judge was required to more fully explain his rationale for according determinative weight to Dr. Simpao's opinion. That is incorrect. *See Napier*, 301 F.3d at 713-714, 22 BLR at 2-553. Further, the majority misreads the administrative law judge's decision when it states that the administrative law judge considered that the doctor's partial reliance on a positive x-ray interpretation supported his finding of legal pneumoconiosis at Section 718.202(a)(4). In fact, the administrative law judge found Dr. Simpao's opinion was supported by its underlying documentation, despite the positive x-ray interpretation associated with it. The administrative law judge credited Dr. Simpao's diagnosis of legal pneumoconiosis, which the doctor said was based on his "findings on the chest x-ray, and pulmonary function test along with physical findings and symptomatology." Director's Exhibit 11; Decision and Order on Remand at 6. The administrative law judge explained that he "factored in Dr. Simpao's reliance upon the x-ray reading," and determined to credit the opinion because the doctor's "finding of legal pneumoconiosis [was] based on the objective medical evidence described, [was] well-reasoned and well-documented and entitled to full probative weight." Decision and Order on Remand at 7. It is clear from

the administrative law judge's decision that he determined Dr. Simpao's medical opinion was based on factors other than the positive x-ray reading and, therefore, the administrative law judge properly found the opinion well-reasoned and documented. *Napier*, 301 F.3d at 712, 22 BLR at 2-550-551 (administrative law judge properly credited medical opinions of legal pneumoconiosis based on factors other than the discredited x-ray evidence, which was also cited). The doctors properly credited by the administrative law judge in *Napier*, like Dr. Simpao, provided dates and results of the tests they conducted. The Sixth Circuit firmly rejected the argument of Napier's employer that the opinions of these doctors were not sufficiently documented and reasoned. The court declared:

> The basic flaw in Jericol's argument is that it fails to recognize that "[t]he determination as to whether [a physician's] report was sufficiently documented and reasoned is essentially a credibility matter. As such, it is for the factfinder to decide." *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983).

Napier, 301 F.3d at 712, 22 BLR at 2-551. *Napier* shows that the administrative law judge did not abuse his discretion in crediting Dr. Simpao's opinion of legal pneumoconiosis, which was based on a positive x-ray and other identified factors.

Similarly devoid of merit is employer's contention that this case must be remanded to the administrative law judge for a more detailed explanation of his determination that Dr. Simpao diagnosed a permanent impairment, which is supportive of a finding of a chronic respiratory impairment. The administrative law judge reasonably interpreted Dr. Simpao's opinion as finding a permanent impairment because Dr. Simpao stated that claimant was not capable, from a respiratory standpoint, of performing the work of a coal miner, thereby indicating that claimant's condition was not temporary but permanent. *See* 20 C.F.R. §718.201; *see Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 523, 22 BLR 2-494, 2-513 (6th Cir. 2002)(We must defer to the administrative law judge's authority in finding facts.); Decision and Order on Remand at 7; Director's Exhibit 11. Furthermore, Dr. Simpao, diagnosed a mild impairment in filling out the section in the medical report which asks for the extent of any impairment, if the patient has chronic respiratory or pulmonary disease. Director's Exhibit 11. The doctor's response makes clear that he diagnosed claimant as having a chronic respiratory or pulmonary disease. Employer's argument to the contrary is specious. Consequently, employer has failed to demonstrate that the administrative law judge abused his discretion in interpreting Dr. Simpao's opinion as supporting a finding of a chronic lung disease arising out of claimant's coal mine employment. 20 C.F.R. §718.201; *Napier*, 301 F.3d at 712, 22 BLR at 2-551; *Stephens*, 298 F.3d at 522, 22 BLR at 2-513; Decision and Order on Remand at 7; Director's Exhibit 11.

Likewise, I would affirm the administrative law judge's finding that Dr. Repsher's medical opinion is neither well-reasoned nor well-documented. The administrative law judge weighed Dr. Repsher's opinion and reasonably found that it was entitled to little weight on the issue of legal pneumoconiosis because Dr. Repsher did not explain his opinion that claimant's chronic bronchitis and pulmonary emphysema were due entirely to claimant's cigarette smoking history. In according little weight to Dr. Repsher's opinion, the administrative law judge properly cited *Cornett*, wherein the Sixth Circuit court held that a physician should explain "his rationale for completely excluding [claimant's] exposure to coal dust as an aggravating factor."[6] *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-120 (6th Cir. 2000). In addition, the administrative law judge properly found that, pursuant to *Barrett*, Dr. Repsher's opinion is not credible, as the Sixth Circuit court has held that a medical opinion which excludes coal dust exposure as a cause of claimant's chronic respiratory disease, without explanation, is insufficient to rebut the 20 C.F.R. §718.203(b) presumption that claimant's chronic respiratory impairment is due to his coal mine employment and, therefore, should not be credited on the existence of legal pneumoconiosis. 20 C.F.R. §718.203(b); *Barrett*, 478 F.3d at 356, 23 BLR at 2-485. Because employer has questioned the administrative law judge's credibility determination without demonstrating legal error, the administrative law judge's determination to accord little weight to Dr. Repsher's opinion should be affirmed. The law is pellucid in the Sixth Circuit that '"absent an error of law, findings of fact and conclusions flowing thereform [sic] must be affirmed if supported by substantial evidence."' *Knuckles*, 869 F.2d at 997, 12 BLR at 2-218 (*quoting Riley v. National Mines Corp.*, 852 F.2d 197, 198, 11 BLR 2-182, 2-184 (6th Cir. 1988)).

Employer also challenges the administrative law judge's discrediting of Dr. Fino's opinion on the issue of causation pursuant to 20 C.F.R. §718.204(c). Dr. Fino found claimant totally disabled by a respiratory impairment caused by smoking. He explained that claimant's moderate obstructive impairment was "most consistent with a smoking-related abnormality." Employer's Exhibit 2 at 4. Dr. Fino further explained that because claimant's twenty years of coal mine employment was subsequent to enactment of dust regulations, claimant's loss in pulmonary capacity would not be "clinically significant, he would still be below 60% and therefore disabled." Employer's Exhibit 2 at 4. The administrative law judge found that Dr. Fino's opinion, attributing claimant's obstructive

[6] Employer attempts to undermine the administrative law judge's citation of *Cornett* by quoting *dicta* from *Williams* in which the court held that the "real issue" was not the existence of legal pneumoconiosis, but the credibility of Dr. Dahhan's testimony that death was caused by an upper GI bleed unrelated coal dust exposure. *Eastover Mining Co. v. Williams*, 338 F.3d 501, 515-516, 22 BLR 2-625, 2-651-652 (6th Cir. 2003); Brief of Employer at 18.

impairment entirely to smoking was not well-reasoned, citing *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 22 BLR 2-265 (7th Cir. 2001). The administrative law judge quoted the relevant language in the court's opinion:

> Dr. Fino stated in his written report of August 30, 1998 that "there is no good clinical evidence in the medical literature that coal dust inhalation in and of itself causes significant obstructive lung disease." (citation omitted). During a rulemaking proceeding, the Department of Labor considered a similar presentation by Dr. Fino and concluded that his opinions "are not in accord with the prevailing view of the medical community or the substantial weight of the medical and scientific literature."

Decision and Order on Remand at 14, *citing Summers*, 272 F.3d at 483 n.7, 22 BLR at 2-281 n.7.

On appeal, employer contends that the Seventh Circuit incorrectly stated that Dr. Fino's comments were "at odds" with the Department of Labor's conclusions. Brief for Employer at 20-21. However, review of the comments to the regulations belies employer's assertion. The Department of Labor cited studies of miners post enactment of the Federal Coal Mine Health and Safety Act of 1969; they showed a decline in pulmonary function attributable to coal mine dust-induced obstructive lung disease. 65 Fed. Reg. 79940 (Dec. 20, 2000). The Department of Labor explicitly disputed Dr. Fino's conclusion that the average decline shown by these studies "does not result in any impairment." 65 Fed. Reg. 79940 (Dec. 20, 2000). The Department of Labor stated:

> [T]he individual miners affected can have quite severe disease, and statistical averaging hides this effect. The amended definition clarifies that these miners have a right to prove their case with evidence of a disabling obstructive lung disease that arose out of coal mine employment.

65 Fed. Reg. 79941 (Dec. 20, 2000).

The comments show that Dr. Fino's opinion cannot be relied upon to exclude claimant's more than twenty years of coal dust exposure as a contributor to his disabling respiratory impairment. The administrative law judge has provided a rational basis to find unreasoned Dr. Fino's opinion that claimant's lengthy coal dust exposure has not contributed to or aggravated claimant's disabling respiratory impairment. Again, employer has failed to demonstrate that the administrative law judge abused his discretion in questioning the credibility of Dr. Fino's opinion. *See Crisp*, 866 F.2d at 185, 12 BLR at 2-129 (*quoting Moseley*, 769 F.2d at 360, 8 BLR at 2-25, "whether a physician's report is sufficiently documented and reasoned is a credibility matter left to the trier of fact.").

Because employer has failed to demonstrate that the administrative law judge abused his discretion in crediting Dr. Simpao's opinion and in discrediting the opinions of Drs. Repsher and Fino, I would affirm the administrative law judge's determination that claimant established the existence of legal pneumoconiosis and that it is a substantial contributing cause of his disabling respiratory impairment. *See Barrett*, 478 F.3d at 356, 23 BLR at 2-485; *Napier*, 301 F.3d at 712, 22 BLR at 2-551.

Accordingly, I would affirm the award of benefits.

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REGINA C. McGRANERY
Administrative Appeals Judge